

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JODY DOUGLAS STUART,

Defendant-Appellant.

UNPUBLISHED

July 19, 2011

No. 296925

Oakland Circuit Court

LC No. 1994-131325-FH

Before: TALBOT, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Jody Douglas Stuart pleaded guilty to possession with intent to deliver less than 50 grams of a mixture containing cocaine, second offense.¹ He was originally sentenced in November 1994 to 365 days in jail and lifetime probation. In October 2009, Stuart pleaded guilty to violating his probation and was sentenced to 2 to 40 years in prison. He challenges this sentence. We affirm.

Preliminarily, Stuart contends that this Court has jurisdiction to hear this appeal as a matter of right because he was convicted on the underlying crime following a jury trial.² Stuart's plea-based conviction predated December 27, 1994, the effective date of the legislation implementing Proposal B, which eliminated the right of appeal for a person convicted by plea. Our Supreme Court has held that if an underlying crime was committed before the effective date of the Proposal B implementing legislation, the defendant would have an appeal by right *from a plea of guilty to a probation violation* where the probation was based on a plea of guilty to the underlying crime.³ Accordingly, Stuart properly filed a claim of appeal instead of an application for leave to appeal and this Court has jurisdiction to hear the case as a matter of right.

¹ MCL 333.7401(2)(a)(iv) and MCL 333.7413(2).

² MCR 6.445(H)(1).

³ *People v Kaczmarek*, 464 Mich 478, 483-485; 628 NW2d 484 (2001).

Turning to the merits of the appeal, Stuart first argues that he was entitled to an updated presentence investigation report (PSIR) prepared after a face-to-face meeting, and that his PSIR contained various errors and omissions. This issue is not preserved because Stuart failed to object to the PSIR at sentencing. Although Stuart filed a motion to remand in this Court, the motion was not timely because it was not submitted within the time provided for filing his brief on appeal.⁴ Stuart also sought to correct an invalid sentence in the lower court. Similarly, that motion was not timely because it was submitted after the filing of the claim of appeal and was not in conformance with this Court's remand procedure.⁵ We review unpreserved claims of sentencing error for plain error affecting a substantial right.⁶

Stuart's assertion that he was entitled to an updated PSIR based on a face-to-face meeting is unpersuasive. The only applicable requirement is for a *reasonably* updated report.⁷ A completely new report is not required and a supplemental report will suffice.⁸ The record discloses that a three-page supplemental report was prepared in this case, which was sufficient and precludes our finding any error.

Regarding alleged mistakes in the PSIR, Stuart represents (1) that he received a G.E.D. from an adult education center and not while incarcerated; (2) that he did not attend a five-day detox program or follow-up care and therefore could not have failed to attend consistently; (3) that he had three prior probation violations instead of none; and (4) that the date of a misdemeanor conviction was erroneous. Addressing alleged omissions in the report, Stuart asserts that the lower court was not made aware of or did not appreciate information relevant to his rehabilitation from addictive substances and his successful maintenance of a business. Contrary to his position, the record discloses that defense counsel brought this information to the trial court's attention and the trial court indicated that it read many letters submitted in Stuart's support. Stuart also maintains that the trial court did not understand or failed to consider that he had received no direction from the probation department regarding the conditions of his probation and that he was therefore not on notice to comply with the conditions. He also claims that a reference to probation in Wayne County failed to note that the conviction offense was a misdemeanor and not a felony. Finally, Stuart claims that there was no proof regarding the reference to a positive marijuana test. The alleged errors and omissions in the PSIR are irrelevant as the trial court based its sentencing decision primarily on Stuart's commission of other crimes while on probation, which is undisputed. We find that Stuart's substantial rights were not affected by the alleged problems with the PSIR content.

⁴ MCR 7.211(C)(1).

⁵ MCR 6.429(B).

⁶ *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003).

⁷ *People v Triplett*, 407 Mich 510, 511, 515; 287 NW2d 165 (1980).

⁸ *People v Martinez (After Remand)*, 210 Mich App 199, 202; 532 NW2d 863 (1995), overruled on other grounds *People v Cervantes*, 448 Mich 620, 625-626; 532 NW2d 831 (1995).

Stuart also argues that the PSIR failed to contain the required prognosis for his adjustment to the community.⁹ We note that the report indicated that Stuart's adjustment to lifetime probation had been poor and that probation did not appear to deter his criminal activity. The report further indicates that Stuart was screened for alternative programming.

Next, Stuart contends that his minimum sentence is not proportionate. A sentence must be "proportionate to the seriousness of the circumstances surrounding the offense and the offender."¹⁰ While on probation for a drug offense, Stuart was charged in Wayne County with five other drug offenses and pleaded guilty to two of the offenses. Given this conduct, a minimum sentence of two years in prison is not disproportionate.

Stuart also argues that his right to due process was violated because his sentence was increased based on facts that he did not admit and were not proven to a jury.¹¹ Stuart acknowledges that our Supreme Court has rejected similar challenges to Michigan's indeterminate sentencing scheme.¹² Although Stuart contends that these cases were wrongly decided, this Court is bound to follow the precedents of our Supreme Court and Stuart is not entitled to relief.¹³

In a supplemental brief, Stuart contends that the trial court was required to articulate reasons for imposing the maximum sentence of 40 years. Although the court had discretion to impose a lesser term¹⁴ it was not required to articulate on the record that it was aware of that discretion.¹⁵ "Rather, absent clear evidence that the sentencing court incorrectly believed that it lacked discretion, the presumption that a trial court knows the law must prevail."¹⁶ Because the court was not required to articulate that it was aware of its discretion whether to impose the statutory maximum sentence, it logically follows that it was also not required to articulate the basis for imposing the sentence.

Finally, Stuart asserts that his maximum sentence is not proportionate. "If an habitual offender's underlying felony and criminal history demonstrate that he is unable to conform his

⁹ MCL 771.14(2)(a).

¹⁰ *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

¹¹ Citing *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

¹² *People v McCuller*, 479 Mich 672, 682-683; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 156; 715 NW2d 778, (2006).

¹³ *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005).

¹⁴ MCL 333.7413(2).

¹⁵ *People v Knapp*, 244 Mich App 361, 389; 624 NW2d 227 (2001).

¹⁶ *Id.*

conduct to the law, a sentence within the statutory limit is proportionate.”¹⁷ In imposing sentence, the trial court considered Stuart’s community support but observed that the probation violation indicated that Stuart was again engaged in drug activity and had committed the crime while on probation. The presentence report indicates that Stuart tested positive for marijuana in 2007 while on probation and that he committed an assaultive misdemeanor offense in 2006. These facts indicate that Stuart was unable to conform his conduct to the law. Accordingly, his sentence within statutory limits is not disproportionate.

Affirmed.

/s/ Michael J. Talbot
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher

¹⁷ *People v Compeau*, 244 Mich App 595, 599; 625 NW2d 120 (2001), citing *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997).